

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**PRECISE FINISHING SYSTEMS, INC,
Plaintiff,**

v.

**Case No. 14-143983-CK
Hon. James M. Alexander**

**JGM VALVE CORP and QSM, INC,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant QSM's motion for partial summary disposition. In its motion, QSM seeks dismissal of Plaintiff's Count I for Negligence; Counts II and III for breach of implied and express warranties; and Count IX for Misrepresentation. QSM's motion does not seek dismissal of Plaintiff's remaining claim against it for breach of contract (Count VIII).

In its Complaint, Plaintiff generally alleges that it supplies paint systems to automobile OEMs. In November 2013, Plaintiff contracted with Defendant JGM Valve to supply silicone-free valves for use a General Motors plant in Mississippi and a Toyota-Lexus plant in Kentucky. JGM, in turn, contracted with QSM for supply of the valves for Plaintiff's projects. Automotive paint systems must include silicone-free valves or the paint will not properly adhere to the vehicles. The GM and Toyota systems were designed to paint every car manufactured in the Mississippi and Kentucky plants.

After installation in the summer of 2014, the GM plant system was immediately determined to contain silicone during a pressure test. Plaintiff was then compelled to advise Toyota that its system may also be contaminated. Toyota tested the system and also found silicone. Plaintiff was then required to disassemble, clean, and replace all affected components of the paint systems at great cost and effort due to the QSM valves supplied through JGM.

During the replacement process, Plaintiff also contacted QSM directly to obtain some replacement valves and stressed that said valves must be silicone free. QSM then shipped valves to Plaintiff, who tested the same and found them “riddled with silicone.”

To recover its damages, Plaintiff filed the present Complaint on negligence, breach of implied and express warranty, breach of contract, and misrepresentation claims. QSM now moves for summary disposition, essentially arguing that all claims except the breach of contract claim must be dismissed.

To its end, QSM moves for summary disposition under MCR 2.116(C)(8), which tests the legal sufficiency of the complaint. All well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158; 483 NW2d 26 (1992). A motion under this subrule may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* When deciding such a motion, the court considers only the pleadings. MCR 2.116(C)(G)(5).

1. Count I – Negligence

QSM first argues that, under the economic-loss doctrine, it is entitled to dismissal of Plaintiff’s Count I for negligence because Plaintiff’s remedy exists in contract alone. In support,

QSM cites *Neibarger v Universal Coops*, 439 Mich 512, 520; 486 NW2d 612 (1992) for the proposition that: “The economic loss doctrine, simply stated, provides that “[w]here a purchaser’s expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only ‘economic’ losses.” *Neibarger*, 439 Mich at 520; quoting *Kershaw Co Bd of Ed v United States Gypsum Co*, 302 SC 390, 393; 396 SE2d 369 (1990), and *Kennedy v Columbia Lumber & Mfg Co*, 299 SC 335, 345; 384 SE2d 730 (1989).

Under this doctrine, QSM argues, “a purchaser such as [Plaintiff] [is] prohibited from bringing a tort claim (such as one for negligence) on account of defective merchandise.” Instead, Plaintiff is restricted to bringing a contract claim alone.

In response, Plaintiff offers little analysis beyond citing the general law on this subject. But Plaintiff appears to argue that a lack of privity is an exception to the economic-loss doctrine. But this argument has been specifically rejected by the Court of Appeals. *Sullivan Industries, Inc v Double Seal Glass Co*, 192 Mich App 333, 344; 480 NW2d 623 (1991) (holding “the trial court clearly erred in finding that the absence of privity between Sullivan and Norton precluded an application of the economic-loss doctrine”); and *Freeman v DEC Int’l*, 212 Mich App 34, 36; 536 NW2d 815 (1995) (holding “the buyer’s remedies are not based on tort but on rights of recovery provided by the UCC, irrespective of the existence of privity of contract”).

For all of the above reasons, considering only the pleadings, and accepting all well-pled factual allegations as true, the Court concludes that Plaintiff’s negligence claim (Count I) is “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” As a result, QSM’s motion for summary disposition under MCR 2.116(C)(8) is GRANTED, and Plaintiff’s Count I is DISMISSED.

2. Count III – Breach of Express Warranty

QSM next moves for summary disposition of Plaintiff’s Count III for breach of express warranty. QSM argues that it is entitled to dismissal of this claim because there is no privity of contract between it and Plaintiff with respect to the valves actually installed in the GM and Toyota plants.

Indeed, the creation of express warranties is governed by Michigan’s Uniform Commercial Code at MCL 440.2313. The Court of Appeals has analyzed this statute and concluded that, “where there is no contract, and therefore no ‘bargain,’ there can be no express warranty under MCL 440.2313.” *Heritage Res, Inc v Caterpillar Fin Servs Corp*, 284 Mich App 617, 635; 774 NW2d 332 (2009). The *Heritage* Court continued, “[g]iven that it is undisputed that plaintiff had no contract with [defendant], we hold as a matter of law that [said defendant] could not have made any express warranties directly to plaintiff.” *Id.*

In response, Plaintiff again recites the general law on this subject and argues that it “believes that its purchase orders were attached to the JGM purchase orders and/or QSM was aware of the requirement for silicone free valves.” But this is insufficient under *Heritage* to create an express warranty.

Because QSM made no promises to Plaintiff with respect to the valves obtained through JGM, Plaintiff’s breach of express warranty claim against QSM fails as a matter of law, and the same is DISMISSED (only with respect to the valves obtained through JGM).

With respect, however, to Plaintiff’s breach of express warranty claim based on the valves obtained directly from QSM, Plaintiff has sufficiently stated a cause of action for breach of express warranty such that the Court cannot conclude that no possible factual development

could possibly deny Plaintiff's right to recovery. As a result, with respect to only these valves, QSM's motion is DENIED.

3. Count II – Breach of Implied Warranty

QSM next argues that Plaintiff's Count II for breach of implied warranty should be dismissed because both parties are business entities, and as a result, privity of contract is required to successfully assert an implied warranty claim.

In support, QSM cites to *Mt Holly Ski Area v US Electrical Motors*, 666 F Supp 115, 120 (ED Mich 1987), which cited a split in the Michigan Court of Appeals, examined law from other jurisdictions, and held (emphasis added):

in order for a plaintiff to recover economic losses on a breach of implied warranty theory under Michigan contract law, privity of contract must exist between the plaintiff and the defendant. Where an individual suffers personal injury from a defective product, public policy correctly dictates that the individual may recover from the ultimate wrongdoer who is better able to spread the costs of protecting itself from liability. Where, as here, **a business entity suffers only economic losses** because of a failure to perform the contract, the business entity's recourse should be against the other contracting party rather than some person or entity further along the chain of distribution. As the court stated in *Hole*, the buyer should pick his seller with care, particularly where both the buyer and the seller are sophisticated businesses.

In fact, numerous federal Courts facing this issue have acknowledged that Michigan law is unsettled, and there appears no Michigan case that conclusively resolves whether privity is required for breach of implied warranty claims. Michigan Courts also acknowledge the lack of clear direction by the issue. See *Heritage Res, Inc v Caterpillar Fin Servs Corp*, 284 Mich App 617, 639; 774 NW2d 332 (2009) (reasoning “[w]e urge the Supreme Court to clarify this matter, which has been the subject of increasing commercial litigation in recent years.”).¹

¹ The *Heritage Res* Court reasoned:

Acknowledging the unsettled nature of the law on this issue and the need for clear direction from our appellate courts, the Court is more persuaded by and adopts the reasoning of the *Mt Holly Ski Area* Court. In a commercial transaction, an experienced business entity should not be permitted to bring an implied warranty claim against another business entity absent privity.

For these reasons, the Court finds that Plaintiff may only bring a breach of implied warranty claim against QSM based on the valves obtained directly from QSM – where privity exists under the Plaintiff-QSM contract. With respect to the valves obtained through JGM, however, Plaintiff’s claim is DISMISSED.

We have held in this case that, because an express warranty is a specific term of the contract, contractual privity is required for a plaintiff to enforce an express warranty against a remote manufacturer. In contrast, our Supreme Court has held, at least in certain circumstances, that an injured plaintiff who is not in privity of contract with a remote manufacturer may nonetheless enforce an implied warranty against that manufacturer. *Piercefield*, 375 Mich at 98; *Spence*, 353 Mich at 126-135. Much confusion surrounds our Supreme Court's decisions in *Piercefield* and *Spence*. As noted by several federal courts interpreting Michigan law, it is unclear if *Piercefield* and *Spence* removed the common-law privity requirement for plaintiffs in all actions for breach of implied warranty, or only for such plaintiffs who have not sustained solely economic losses.¹⁴ Moreover, various panels of this Court have reached disparate results after applying the decisions in *Piercefield* and *Spence*. See *Cova v Harley Davidson Motor Co*, 26 Mich App 602, 604-610; 182 NW2d 800 (1970) (extending the rule of *Piercefield* and *Spence*, which eliminates the requirement of privity, to a claim of breach of implied warranty involving purely economic loss); but see *Auto Owners Ins Co v Chrysler Corp*, 129 Mich App 38, 43; 341 NW2d 223 (1983) (holding that a party’s claim of breach of implied warranty was barred by a lack of contractual privity with the remote manufacturer). Similarly, it is unclear whether the adoption of the UCC--and in particular Alternative A of UCC § 2-318, codified in Michigan as MCL 440.2318--has in any way affected the continued viability of *Piercefield* and *Spence*, neither of which was decided under the UCC. We urge the Supreme Court to clarify this matter, which has been the subject of increasing commercial litigation in recent years.

Note 14 – See, e.g., *Pack v Damon Corp*, 434 F3d 810, 818-820 (CA 6, 2006) (stating that no privity is required under Michigan law for claims of breach of implied warranty); *Harnden v Ford Motor Co*, 408 F Supp 2d 315, 322 (ED Mich, 2005) (stating that privity is required under Michigan law for claims of breach of implied warranty); *Ducharme v A & S RV Center, Inc*, 321 F Supp 2d 843, 853-854 (ED Mich, 2004) (same); *Pitts v Monaco Coach Corp*, 330 F Supp 2d 918, 924-926 (WD Mich, 2004) (same); *Parsley v Monaco Coach Corp*, 327 F Supp 2d 797, 803-805 (WD Mich, 2004) (same); *Mt Holly Ski Area v US Electrical Motors*, 666 F Supp 115, 117-120 (ED Mich, 1987) (same).

4. Count IX – Misrepresentation

Finally, QSM argues that it is entitled to summary disposition of Plaintiff's misrepresentation claim.

To establish a claim of fraudulent misrepresentation, plaintiff was required to prove that: (1) defendant made a material representation; (2) the representation was false; (3) defendant knew, or should have known, that the representation was false when making it; (4) defendant made the representation with the intent that plaintiff rely on it; (5) and plaintiff acted on the representation, incurring damages as a result. Plaintiff must also show that any reliance on defendant's representations was reasonable. *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005). *Hi-Way Motor Corp v Int'l Harvester Co*, 398 Mich. 330, 336; 247 N.W.2d 813 (1976), citing *Candler v Heigho*, 208 Mich. 115, 121; 175 N.W. 141 (1919).

Further, "fraud must be pleaded with particularity." *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008), citing MCR 2.112(B)(1). With respect to this claim, QSM argues that Plaintiff failed to adequately plead facts sufficient to support its misrepresentation claim. Indeed, even a cursory review of Plaintiff's Count IX reveals that Plaintiff simply inserted QSM's name into each of the misrepresentation elements. There is, however, not a single factual allegation.

The Court of Appeals has cautioned, "[c]onclusory statements, unsupported by factual allegations, are insufficient to state a cause of action." *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003); citing *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994).

This is precisely the case here. Plaintiff alleges legal conclusions (rather than factual allegations) that QSM made fraudulent misrepresentations. While a (C)(8) motion requires the Court to accept "all well-pled allegations" as true, it does not require the Court accept all pled legal conclusions as true.

For the foregoing reasons, the Court finds that Plaintiff's misrepresentation claims fail as a matter of law under (C)(8), and said claim is DISMISSED as to Defendant QSM.

Summary

To summarize, QSM's motion for partial summary disposition under (C)(8) is GRANTED IN PART.

Plaintiff's Count I for Negligence is DISMISSED. Plaintiff's Counts II and III for Breach of Implied and Express Warranty are DISMISSED, but only with respect to any claims founded on valves obtained through JGM. Finally, Plaintiff's Count IX for Misrepresentation is DISMISSED.

In all other respects, QSM's motion is DENIED.

IT IS SO ORDERED.

March 18, 2015
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge